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MARTIN CIRCUIT COURT

Commonwealth Of Kentucky
Court Of Appeals

FINAL

No. 85-CA-2625-MR

DATE NOV 19 1986

RAY BLACKBURN

APPELLANT

V.

APPEAL FROM THE MARTIN CIRCUIT COURT
HON. STEPHEN FRAZIER, JUDGE
CASE NO. 83-CI-102

FLOYD KIRK and
MARY FANNIN

APPELLEES

AFFIRMING

* * * *

BEFORE: GUDGEL, CLAYTON and DUNN, Judges.

DUNN, JUDGE. Ray Blackburn appeals from the judgment of the Martin Circuit Court which denied him the right to use a passway in Martin County.

He owns real estate in Martin County adjacent to property owned by the appellees Floyd Kirk and Mary Fannin. He is a non-resident of Kentucky who after leasing his coal interest on the subject property attempted to allow the coal company to haul the coal over a passway on property owned by the appellees. They objected to such use and blocked passage on it through their property by installing gates on their property. Thereafter, the

appellant sued in the Martin Circuit Court alleging that the passway involved was a proscriptive public road and that he ought to be allowed its use for any purpose.

After a bench trial, the trial court issued findings of fact to the effect that: the passway involved was never used as a public road or by automobiles, the appellees need their fences and gates to keep their cattle in their pasture, the present roadway was built in order to haul logs, the county had graded the road up to a cemetery, grading was often done by the county upon request even though the passway was not part of the county road system, it was 10 to 12 feet wide and had not been used continuously during the past 15 years, and the appellant has another way out of his property over another road. Based on those findings the court concluded that the passway in question was not a public road and that the appellees were permitted to keep the gates they had installed. Judgment was accordingly entered from which appellant appeals.

CR 52.01 mandates that we not disturb the findings of the trial court unless they are clearly erroneous. Our review of the record reveals proof to substantiate every finding and conclusion of the trial court. The testimony offered by the appellant's witnesses was at best neutral to the issues involved. In fact the testimony illicited at the trial puts this case on four corners with the case of Sarver v. County of Allen, Ky., 582 S.W.2nd 40 (1979). In Sarver, supra, the court held that the use of a passway for the purpose of access to two houses and the fact that there had been virtually no travel on the disputed path for

some 30 years with the exception of some grading work done by the county from time to time and the possible use as a private convenience to the owners or occupants of adjoining property did not support the court's finding that the disputed road was a public road. In the case at bar, the only use of the passway in question was the occasional use for travel to a cemetery located up the hollow and use by a gas company. Clearly, these activities, as well as the occasional grading of the road by the county, do not make it a proscriptive public road.

Appellant argues in the alternative that the trial court erred in failing to find that he had established the right to use the road as a private passway over the appellees' property. In Cummings v. Fleming County Sportsmen's Club, Inc., Ky., 477 S.W.2d 163 (1972), the former Court of Appeals held that in order to establish a proscriptive public passway it must be shown that the road was used by the general public for 15 years. The court found and the evidence supports the finding that the roadway had not been so used. Therefore, the trial court's findings are not clearly erroneous and its judgment is AFFIRMED.

ALL CONCUR.

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